

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 14 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRAD LEE BRANDON,

Defendant - Appellant.

No. 04-30244

D.C. No. CR-03-00070-RFC

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Argued and Submitted September 15, 2005
Seattle, Washington

Before: SCHROEDER, Chief Judge, ALARCON and KLEINFELD, Circuit
Judges.

We affirm Brandon's sentence imposed after his guilty plea for being a felon
in possession of a firearm¹ and possession of a sawed-off rifle.²

^{*} This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

¹18 U.S.C. § 922(g)(1).

²26 U.S.C. § 5861(d).

Brandon's claim that the 2003 amendment to the U.S. Sentencing Guidelines § 3E1.1(b) violate the separation of powers doctrine by requiring a motion from the prosecutor before the sentencing court may grant a third point offense level reduction is without merit. First, the Supreme Court has held that sentencing is a function shared among the three branches of government.³ Second, this section is comparable to other Guideline sections which grant discretion to the prosecutor, such as § 5K1.1, that have already been specifically upheld by the Supreme Court as a constitutional.⁴ In these situations, the prosecutor's decision not to move for an additional point reduction is only reviewed for unconstitutional motives, which are clearly not present here.

However, we grant a limited remand to allow the district court to answer the question whether it would have imposed a different sentence had the Guidelines been viewed as advisory.⁵

AFFIRMED in part and REMANDED.

³488 U.S. 361 (1989).

⁴*Wade v. United States*, 504 U.S. 181, 185 (1992).

⁵*United States v. Ameline*, 409 F.3d 1073, 1079 (9th Cir. 2005).